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CPLR 5105: Enforcement of Money Judgment by Contempt Held Not to Apply to Remedial Fiduciary Situation

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execution had always been available to enforce judgment costs, as opposed to motion costs.

It is important to note that the stay power is discretionary. The court will take into consideration the merits of the case, the impecunious status of the litigant, as well as other circumstances in determining whether to exercise the stay. Lastly, although the subsequent action need not be identical to the prior action, it must be shown to be sufficiently similar to it, *i.e.*:

the common law discretionary power to stay will be available if the second action has the purpose of seeking some form of relief, previously available, for the same or substantially the same conduct in the same sequence of events regardless of the form of action or the legal categories in which the conduct may be classified.²⁰⁶

CPLR 5105: Enforcement of money judgment by contempt held not to apply to remedial fiduciary situation.

As a general rule, money judgments can be enforced *solely* by execution under Article 52.²⁰⁷ CPLR 5105(2) is an exception; it provides that where the judgment "requires a trustee or person acting in a fiduciary relationship to pay a sum of money for a willful default or dereliction of his duty,"²⁰⁸ contempt proceedings under CPLR 5104 may be employed to enforce the judgment. The basic reason for the enactment of this statute and its predecessor, CPA § 505(5), was that the law, as a matter of policy, requires a higher standard of conduct of a fiduciary or trustee than of a person with whom one deals at arm's length.²⁰⁹ As a consequence, the fiduciary is vulnerable to contempt proceedings when he violates this trust. It has been argued that remedial relationships such as constructive trusts,²¹⁰ should be included within the scope of CPLR 5105(2), giving the term fiduciary its broadest meaning.²¹¹ However, it must be recognized that such an expansive reading of the term "fiduciary" would greatly increase the number of exceptions to the present rule, so as to make the con-

²⁰⁶ Associated Sales Analysts, Inc. v. Weitz, *supra* note 199, at 69, 266 N.Y.S.2d at 857.

²⁰⁷ 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5105.01 (1965).

²⁰⁸ *Ibid.*

²⁰⁹ See 1947 N.Y. LEG. DOC. NO. 19, THIRTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL 242.

²¹⁰ These constructive trusts are frequently judicial constructs designed to secure an equitable accommodation between the parties. *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 346 (1966).

²¹¹ 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5105.07 (1965).

tempt process more readily available for the enforcement of money judgments.²¹²

In *National Sur. Corp. v. Silver*,²¹³ the Court of Appeals reversed the appellate division,²¹⁴ and held that the remedies against fiduciaries contained in CPLR 5105(2) did not apply where a bonded employee had embezzled funds from his employer, the plaintiff's insured. In its decision, the Court reasoned that the employee did not stand in the fiduciary relationship to his employer that was contemplated by the statute. The judgment, therefore, could be nothing more than a "money judgment rendered . . . with the consent of the defendant,"²¹⁵ the equivalent of a direction for a recovery of converted funds. As a money judgment in conversion it is not enforceable by contempt proceedings but only by execution under Article 52.

The crucial factors in determining the applicability of CPLR 5105(2) are the nature of the relationship between the parties and the nature of the wrong.²¹⁶ It is this fiduciary relationship that is the basis of the power to punish for contempt. Such a relationship was held not to exist when an agent converted moneys given him by plaintiff in the course of business²¹⁷ or where a final judgment was issued directing plaintiff to pay defendant a sum of money.²¹⁸ On the other hand, the relationship has been held to exist between a mother and a daughter to whom she had turned over her funds in trust,²¹⁹ between two persons engaged in a joint venture,²²⁰ and between an executrix and sole heir.²²¹ In each of the latter situations a consensual trust was involved, while the

²¹² *Ibid.* See *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 347 (1966).

²¹³ 17 N.Y.2d 477, 214 N.E.2d 162, 266 N.Y.S.2d 983 (1966).

²¹⁴ *National Sur. Corp. v. Silver*, 23 App. Div. 2d 398, 261 N.Y.S.2d 511 (1st Dep't 1965). See *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 346 (1966). This court applied CPLR 5105(2) to a situation where a remedial trust was involved. Until reversed in the instant decision, the lower court's opinion appeared to be authority for the enforcement of a judgment by contempt against any defendant found to be a constructive trustee.

²¹⁵ *Id.* at 398, 261 N.Y.S.2d at 516. See *Hennig v. Abrahams*, 246 App. Div. 621, 282 N.Y. Supp. 970 (2d Dep't 1935).

²¹⁶ 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5105.07 (1965).

²¹⁷ *Matter of Longslow*, 167 N.Y. 314, 60 N.E. 590 (1901).

²¹⁸ *Harris v. Elliot*, 163 N.Y. 269, 57 N.E. 406 (1900).

²¹⁹ *Pieper v. Renke*, 4 N.Y.2d 410, 151 N.E.2d 837, 176 N.Y.S.2d 265 (1958).

²²⁰ *R. C. Gluck & Co. v. Tankel*, 12 App. Div. 2d 339, 211 N.Y.S.2d 602 (1st Dep't 1961).

²²¹ *Lefkowitz v. Grosswald*, 33 Misc. 2d 905, 906, 225 N.Y.S.2d 386, 389 (Sup. Ct. Bronx County 1962), *aff'd without opinion*, 16 App. Div. 2d 889, 229 N.Y.S.2d 736 (1st Dep't 1962).

instant case involved a remedial trust. Thus, the Court has shown its reluctance to expand the term fiduciary to the constructive or remedial fiduciary situation. In addition, the Court has not found a situation such as the present one to be sufficiently reprehensible to warrant characterizing it as "willful default or dereliction" of duty. This being so, enforcement of the judgment in such a case can be brought by execution only.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5221(a): County in which money judgments are to be enforced; defect in venue is waivable.

In *Silbert v. Silbert*,²²² the corporate garnishee had been served with a restraining order issued by the Supreme Court, of Westchester County, in a separation action instituted by a wife against her spouse, an employee of the garnishee. The corporate garnishee, however, despite the restraining order, paid the husband over \$30,000 of which \$6,000 was in dividends. Upon the wife's motion, the court held the garnishee, whose only place of business was in New York County, guilty of contempt for its violation of the restraining order. The appellate division, second department, affirmed the lower court on this issue stating that although CPLR 5221(a) requires that such a proceeding be brought in the county in which the garnishee resides, which in this instance was New York County and not Westchester County, such defect in venue was waived by the garnishee's failure to take timely exception thereto. It reversed in part, however, holding that the restraining order did not reach wages and certain of the dividends which had been assigned to other judgment creditors.

CPLR 5221(a) specifically requires that a proceeding under Article 52 must be commenced in "a county in which the respondent resides or is regularly employed or has a place for the regular transaction of business."²²³ "Unless it meets the test of subdivision (a), the county in which the judgment was rendered is not a proper place for an Article 52 special proceeding."²²⁴ Generally this rule takes into account the convenience of the respondent (the garnishee here) and the probability that he will be more apt to be present in the county where he conducts his business.²²⁵

²²² 25 App. Div. 2d 570, 267 N.Y.S.2d 744 (2d Dep't 1966).

²²³ See 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5221.04 (1965).

²²⁴ *Ibid.* See *Manufacturers Trust Co. v. Valenti*, 17 Misc. 2d 386, 186 N.Y.S.2d 363 (Sup. Ct. N.Y. County 1959).

²²⁵ 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5221.04 (1965).